Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-713

MORRILTON SCHOOL DISTRICT NO. 32, TERRY A. HUMBLE, Superintendent; W. O. BYRD, DR. H. B. WHITE, HUGH LOVE, WILLIAM CHEEK, Members; ~~PLUMERVILLE SCHOOL DISTRICT NO. 39, DOYLE BORDER, Superintendent;~~ WILLIAM P. EVANS, JACK GORDON, FRANK DEAVER, CHARLES TOWNSLEY, BILLY GARRETT, Members

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Eighth Circuit entered in this case on June 13, 1979, as amended by its order entered June 18, 1979, and as amplified by its opinion filed August 30, 1979.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is not yet reported. It is set forth in the Appendix, pp. A-1 A-20. The decision and decree of the United States District Court for the Eastern District of Arkansas entered July 26, 1973, supplemental order and decree entered August 23, 1973, decision orally delivered from the bench on March 2, 1979, and order entered March 6, 1979 are unreported. They are set forth in the Appendix, pp. A-21 A-59.

JURISDICTION

The orders of the United States Court of Appeals for the Eighth Circuit were entered June 13, 1979 and June 18, 1979. On September 3, 1979 Mr. Justice Blackmun entered an order granting an extension of time for filing this petition to November 9, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. Is a federal district court authorized to require public school districts, operating racially unitary systems, to consolidate with another district found to be operating a racially unconstitutional system which the former districts did not participate in establishing or maintaining?

II. Did the courts below err in resting their findings of jurisdiction to order public school districts to be consolidated on an inference of intent to discriminate and imputing that intent to petitioners based only on a pattern of school district consolidation in the 1920's, 1930's, and 1940's resulting in some isolated non-continguous areas and one district with a larger proportion of black students than the other five districts in the county?

III. If the district court was correct in its conclusion that it had jurisdiction to require the Morrilton and Plumerville

districts to participate in a compelled remedy for the situation found to be unconstitutional in the East Side District, did it err in selecting and imposing the most drastic and disruptive of the proposed plans before it when other plans before it would have achieved the same constitutional ends with significantly less intrusion by the federal court into local affairs and less abrogation of valid state laws?

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT

Petitioners are two Arkansas public school districts and their managing officials. This suit was brought in 1972 in the United States District Court for the Eastern District of Arkansas by the Attorney General against multiple State and local school entities and authorities alleging that two local entities had been established and maintained as all-Negro elements of a dual school system by the State in violation of the Fourteenth Amendment and Title IV of the Civil Rights Act of 1964. Injunctive relief was sought to correct the alleged situation. Motions of the "State defendants" to dismiss as to them were granted and the case was tried in 1973. Thereafter, Judge J. Smith Henley entered orders holding the East Side School District to be unconstitutional and effectively abolishing the other local entity concerning which complaint was made. As required by the court, all local defendants submitted plans to cure the situation in East Side found unconstitutional.

The district court took no further significant action until 1979 when Judge G. Thomas Eisele (to whom the case was assigned after Judge Henley's appointment to the Court of Appeals) conducted a trial on March 1 and 2, 1979 limited to the issue of a remedy. At the conclusion of that trial he ordered adoption of a

plan sponsored by the government involving consolidation of three of the defendant school districts over the objection of each of them. Petitioners, two of the school districts ordered consolidated, filed a petition in the Court of Appeals to appeal from the district court's orders under the provisions of 28 U.S.C. §1292(b) which was granted. Argument to the Court of Appeals *en banc* was presented on June 12, 1979 and on June 13, 1979 that court's order (amended June 18, 1979 to correct typographical errors) which petitioners seek to have reviewed was entered.

While it was conceded in the district court that petitioners were each operating unitary school systems, Judge Eisele did not undertake to reexamine Judge Henley's 1973 opinion in light of the intervening decisions of this Court and ordered an essentially immediate consolidation of petitioners and East Side School District. In the Court of Appeals the government again conceded that petitioners had each operated unitary school systems for many years and the record clearly demonstrated that neither petitioners, nor their predecessors, had participated in any way in the creation or maintenance of East Side School District. The government's submission in the Court of Appeals, apparently accepted by that court, was that since the ultimate power of the State was involved in fixing the boundaries of the East Side School District the federal courts can involve any state agency found to be convenient to formulating a remedy. That position was stated in this language in the government's Brief in the Court of Appeals:

> "Thus, the controlling question is not, as defendants contend, which group of state agents established the East Side District, but whether it was established by state agents as a part of a dual school system which included the defendant school districts."

In his 1973 decision Judge Henley found petitioners to have been innocent of any unconstitutional acts contributing to the

formation of the East Side District. The Court of Appeals apparently accepted that finding but held that State laws pertaining to school consolidation, although racially neutral, had been employed by the East Side District to bring about its unconstitutional existence and this "State action" provided the jurisdictional basis for ordering the consolidation.

Petitioners assert that these constitutional decisions of the courts below are in conflict with the applicable decisions of this Court and other Courts of Appeals. Petitioners further assert that even if this record did furnish jurisdictional support for imposition against them by the district court of an injunction to participate in some degree in a solution of the situation in the East Side District it found unconstitutional, the extreme sanction of coerced consolidation it did impose is impermissible under the applicable teachings of this Court.

REASONS FOR GRANTING THE WRIT

This case merits review by this Court to settle the recurring question of what constitutes a jurisdictional basis for a federal district court to make the ultimate intrusion into local affairs in a school desegregation context of coerced consolidation of school districts. Many had thought the question to be settled by *Milliken* v. *Bradley,* 418 U.S. 92 (1974). The Fourth Circuit in *Bradley* v. *Richmond,* 462 F. 2d 1058 (4 Cir. 1972) affirmed by an equally divided court in *Bradley* v. *Richmond,* 412 U.S. 92 (1973) and the Fifth Circuit in *Tasby* v. *Estes,* 572 F. 2d 1010 (5 Cir. 1978) *cert. granted sub nom., Estes* v. *Metropolitan Branches of Dallas NAACP,* 99 S.Ct. 1212 (1979) are in agreement that an intentional constitutional violation with a casual nexus to unconstitutional situation sought to be remedied must be demonstrated in order to provide a jurisdictional basis to require an inter-district remedy. The judges of the Seventh Circuit agree with this statement of constitutional principle, but are disagreed among themselves on the nature and scope of the proof of discriminatory intent required in this regard. *United States* v. *Board of School Commissioners,* 573 F.2d 400 (7 Cir. 1978). However, the Eight Circuit, first in *United States* v. *State of Missouri,* 515 F.2d 1365 (8 Cir. 1975) *cert. denied* 423 U.S. 951 (1975), and again in the case at bar has ordered consolidation of school districts innocent of any participation in creating an unconstitutional situation in a nearby school district on the apparent theory, rejected in *Milliken,* that since racially neutral State laws were used to create the unconstitutional result any convenient State instrumentality (i.e. nearby school districts) may be ordered to participate in a remedy.

The historic principle of local control of the public schools is too important to permit this rule to prevail in the Eighth Circuit and to survive as perhaps inviting and persusasive precedent in other jurisdictions.

The courts below failed to give effect to this Court's holding in *Milliken* that in order for a federal court to coerce involvement of a unitary school district in a remedy involving another district found to be guilty of constitutional violation the former must be found guilty of a constitutional violation proximately causing the unconstitutional situation in the latter. The failure to make such a showing in *Milliken,* except in isolated instances and except for discrimination not regarded by this Court to be proximately related to the Detroit school system's unconstitutionality, led to reversal of the lower courts' announced course of involving the districts surrounding Detroit in such a remedy.

While Judge Henley stated in his 1973 opinion, a year prior to the decision in *Milliken,* that "some of the defendant districts in this case did transfer pupils from district to district in order to preserve segregation in the schools,"[1] the cornerstone upon which he rested his decision was that he possessed authority to require restructuring of the State subdivisions before him without a finding of constitutional violation. At page 13 of the opinion he stated:

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[1]There was no such proof pertaining to Morrilton. For decades it has been common to permit students to transfer rather freely from the district of their residence for many non-discriminatory reasons including convenience of travel and access to more comprehensive educational opportunities, but there is no proof in this record that would support a finding that such transfers were accomplished "in order to preserve segregation in the schools." Moreover, this Court in *Milliken* regarded an arrangement whereby Negro students of one district were sent to a predominantly Negro high school in another district to be a "comparatively isolated" situation which would not support the relief ordered by the trial court. This Court also rejected the argument that since all of the school districts involved were subdivisions of the State, the State was derivatively responsible for the actions of each and this would warrant imposition of inter-district relief. The Court concluded that the boundaries of the school districts involved were established pursuant to "neutral legislation" and the fact that the ultimate result of operation under such legislation was heavy concentration of blacks in the Detroit School District did not authorize inter-district relief, saying:

> "* * * the Court does not consider the 'innocence' of the defendant districts to be of controlling importance." (A. 35)

However, the teachings of *Milliken* are to the effect that "innocence" in this context does indeed place a school district beyond the remedial power of a federal court dealing with constitutional violations in other districts. The Court noted at 418 U.S. 745:

> "Conversely, without an inter-district violation and inter-district effect, there is no constitutional wrong calling for an inter-district remedy."

The most that can be said on this record is that the East Side defendants, and their predecessors, employed neutral State legislation to achieve an end result that is arguably unconstitutional.[2] Petitioners had nothing whatever to do with that course of conduct. Neither do the facts in the record afford any basis for an inference that the petitioners have acted to exclude Negro students from their boundaries. From the earliest data introduced at trial to the present they have had significant numbers of Negro students and have discharged their obligation of educating them.

After the publication of *Milliken* Judge Henley requested, and received, briefs dealing with the impact of that decision on this litigation but made no further ruling. Judge Eisele accepted

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> "Where the schools of only one district have been affected, there is no constitutional power in the courts to decree relief balancing the racial composition of that district's schools with those of the surrouding districts." 418 U.S. 749.

[2] "* * * the mere fact of different racial compositions in contiguous districts does not itself imply or constitute a violation of the Equal Protection Clause * * *." 418 U.S. 756

Judge Henley's decision, saying at the 1979 hearing that "Judge Henley declared this system unconstitutional" and ruled that the 1979 proceedings before him would be analogous "to a sentencing procedure, as opposed to a trial." The Court of Appeals accepted the derivative liability concept adopted by Judge Henley, and urged by the government in the courts below, in square conflict with this Court's decision in *Milliken.*

Other decisions of this Court subsequent to Judge Henley's 1973 opinion confirm that in order to establish an equal protection violation by State officials or agencies a "racially discriminatory purpose" or a "purpose and intent to segregate" must be proved. *Columbus Board of Education* v. *Penick,* 61 L.Ed.2d 666 (1979), *Dayton Board of Education* v. *Brinkman,* 61 L.Ed.2d 720 (1979), *University of California* v. *Bakke,* 57 L.Ed.2d 750 (1978) fn. 27 of Mr. Justice Powell's opinion, *Arlington Heights* v. *Metro. Housing Corp.,* 429 U.S. 252 (1977) and *Washington* v. *Davis,* 426 U.S. 229 (1976). The courts below have entirely disregarded this principle in connection with imposition of onerous injunctive sanctions on petitioners notwithstanding their "innocence" as established by the record.

The decisions of the Eighth Circuit Court in *United States* v. *State of Missouri. supra,* and the case at bar are in clear conflict with the decisions of the Fourth and Fifth Circuits with respect to what *Milliken* requires. In *Bradley* v. *School Board of City of Richmond,* 462 F.2d 1058 (4 Cir. 1972) it was held that the federal courts were without authority to order consolidation of unitary school districts in order to bring about a greater degree of racial balance absent a showing of invidious discrimination in the establishment or maintenance of these local governmental units. This Court, equally divided, affirmed notwithstanding proof of territorial exchanges between the districts and multiple findings of the district court of both official and private discrimination contributing to the existing racial concentrations of populations within the districts. 412 U.S. 92 (1973). The

judgment of the Fourth Circuit Court of Appeals was thereafter fully vindicated upon publication of this Court's decision in *Milliken.*

A perceptive application of *Milliken,*[3] subsequently affirmed by the Court of Appeals for the Fifth Circuit is *Tasby* v. *Estes,* 412 F.Supp. 1185 (N.D. Tex. 1975) where the Court declined to include Highland Park Independent School District (HPISD) in a plan to eliminate the unconstitutionally dual school system of Dallas, Texas. Summarizing its jurisdictional limits imposed by *Milliken* in the matter it observed that to include HPISD in the Dallas remedy would require a finding:

> "(1) the HPISD is or was operating a dual school system which is or was a substantial cause of the segregation found to exist within the DISD, or
>
> (2) the HPISD has committed unconstitutionally discriminatory acts of an inter-district nature which have had a significant effect on the DISD."

412 F. Supp. 1188.

The Texas court also noted the elements the post-*Milliken* decisions required to justify inter-district relief by the federal courts in this language:

> "Thus, interdistrict remedies have been ordered where school district boundaries were altered with significant segregative effect, where the constitutional violations of adjoining school districts currently contributed to segregation within each district, where transfers having a significant segregative effect were continuing at the time of trial, and where 'white flight' from an urban district guilty of

[3]In *Bradley* v. *Milliken,* 540 F.2d 229 (6 Cir. 1976) the Sixth Circuit Court of Appeals undertook to explain at length that its earlier decision had been "misunderstood and reported erroneously" asserting that neither it nor the district judge ever had "any intention to consolidate any school districts." 540 F.2d at 235.

> constitutional violations to outlying districts guilty of constitutional violations was occurring."

412 F. Supp. 1191.

The Court of Appeals affirmed the district court's refusal to include the Highland Park District in the desegregation remedy prescribed for the DISD.[4] *Tasby* v. *Ellis,* 572 F.2d 1010 (5 Cir. 1978) *cert. granted sub nom., Estes* v. *Metropolitan Branches of NAACP,* 99 S.Ct. 1212 (1979). The parties seeking inclusion of the Highland Park District did not seek review of that portion of the decision of the Court of Appeals and it is not an issue in that appeal now pending here.

As heretofore noted the judges of the Seventh Circuit Court are in disagreement as to the nature of proof that would be sufficient to support a finding of discriminatory intent that would warrant inter-district relief under *Milliken.* In *United States* v. *Board of School Commissioners, supra,* the author of the panel's decision expresses his views on this subject at some length, the concurring judge states that he is in partial disagreement in the matter, and the dissenting judge says at page 416:

> "* * * I do not think we make the district judge's task any easier by providing him with an advisory interpretation of Supreme Court decisions (which he can read as well as we

[4]"The district court found that the Highland Park Independent School District has not maintained a policy of school segregation since 1958. This finding is supported by the record and, as it is not clearly erroneous, is accepted by this court. Fed. R. Civ. P. 52(a). Given this twenty year history of nondiscrimination and the negligible effect that the system's prior policy of segregation had on the DISD or its own system, we find that the district court did not err in refusing to include the Highland Park Independent School District in the student assignment plan for the DISD. See *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406, 97 S.Ct. 2766, 2775-76, 53 L.Ed.2d 851 (1977); *Milliken* v. *Bradley,* 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974)." 572 F.2d 1016.

can) when we cannot agree among ourselves how they should be interpreted."

The Remedy Imposed

The district court made no findings identifying the specific unconstitutional conduct of the defendant school districts upon which it predicated its jurisdiction or when and by whom it had been committed. It did refer to the unconstitutional situation it found with reference to the East Side District. (A. 32)

The guidelines for the district court's remedial power were defined in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971) and reconfirmed in *Milliken, supra.* In this connection the Court said in *Milliken:*

> "In further refining the remedial process, Swann held, the task is to correct, by a balancing of the individual and collective interests, 'the condition that offends the Constitution.' A federal remedial power may be exercised 'only on the basis of a constitutional violation' and, '(a)s with any equity case, the nature of the violation determines the scope of the remedy.' " 418 U.S. 740-41.

The *Milliken* court also renewed the teaching of *Swann* that desegregation "does not require any particular racial balance in each 'school, grade or classroom.' " 418 U.S. 740-41.

All of defendant school districts, under coercion of court orders, submitted at least one plan of reorganization to cure the situation that the court had found constitutionally offensive in the East Side District. The government submitted two such plans but at the time of trial elected to support its Plan B which generally comprehended consolidating the Morrilton, Plummerville and East Side Districts and leaving the Nemo Vista and Wonderview Districts largely unaffected.

The plans advocated by Plummerville and East Side at trial were essentially the same and comprehended consolidation of

those two districts and the acquisition by the consolidated district of territory of the Morrilton district to provide sufficient additional white students to achieve what they regarded to be a desirable racial balance.

The Morrilton defendants had presented two plans in 1973 in response to the court's order, and when it became evident that the district court would not reconsider the 1973 decision before proceeding with the 1979 trial presented a third plan at that trial.[5] Like the Plummerville and East Side plans, this one comprehended consolidating those two districts. Unlike those plans it provided for Morrilton to acquire enough of the territory of those districts (and the Negro students residing in that territory) to permit the consolidated district to operate schools that were not racially identifiable.

The Superintendents of each of these three districts testified in support of their respective plans,[6] and each asserted that his plan was superior to government Plan B (adopted by the court) because it would retain community identity with the existing schools, support of the patrons and students, local control of the educational program and would minimize any increase in the cost of transportation. Dr. Fullerton testified that in addition to these desirable features Morrilton Plan 3 (the one presented at trial) would avoid an almost intolerable feature of the Plummerville, East Side and government plans—i.e., transferring large numbers of students from the superior school system operated by Morrilton (including the only high school in

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[5]Like the earlier plans this one was tendered with the express reservation that it did not waive the Morrilton defendants' position that the court was without jurisdiction as to them.

[6]While the Nemo Vista and Wonderview Districts were represented at the trial by their respective counsel and superintendents, they offered no evidence.

the county accredited by the North Central Association of Colleges and Schools) to schools offering substantially less educational opportunity. Morrilton Plan 3 would reverse that feature. Under it every student being displaced from his present district (approximately 158 black students) would be transferred to a school offering educational opportunity superior to that of his present school.

In overriding the manifest educational advantages of the plans offered by Morrilton, Plummerville and East Side, and selecting government Plan B, Judge Eisele was obviously preoccupied with achieving racial balance with precision. He required the Nemo Vista and Wonderview Districts to draw their boundaries so as to produce a racial composition of not less than 22% Black, and imposed a requirement on all five of the districts to establish *and maintain* a racial balance in each school *and each grade* not less than 13% nor more than 33% Black. (A. 54)

Of course the district court, before formulating *any* remedy was obligated to make the findings prescribed in *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406, 420 (1977):

> "The duty of both the District Court and the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers, or staff. Washington v. Davis, supra. * * * If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if

> there has been a systemwide impact may there be a systemwide remedy. Keyes, 413 US, at 213, 37 L. Ed.2d 548, 93 S. Ct. 2686."

There is nothing in the written or oral decisions of Judge Henley or Judge Eisele that would remotely pass for such findings, nor does the record provide any basis for such findings. Certainly there is no finding that but for past racially motivated decisions the Morrilton, Plummerville and East Side Districts would have elected to consolidate. To the contrary, the conduct of these districts (reflecting the will of their patrons) both before and after this suit was filed evidences a strong commitment to maintaining local autonomy, and the proposed plans submitted by each, including the East Side District, were consistent with that concern.

Our stress in this application for review is not that these small rural school districts have been the victims of a rather summarily imposed injustice. Although we do strongly assert that to be true. We seek to invoke this Court's review because the basis upon which the courts in the Eighth Circuit are now mandated to order school district consolidation and otherwise intrude into local school affairs is entirely out of step with the controlling decisions of this Court and the decisions of the other Courts of Appeals.

This case does indeed reflect "one rule in Athens, and another rule in Rome."

CONCLUSION

For the foregoing reasons it is submitted that the petition for certiorari should be granted to review the orders and judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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No. 32, et al.

APPENDIX

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 79-1293

Morrilton School District No. 32, Terry A. Humble, Superintendent; W. O. Byrd, Dr. H. B. White, Hugh C. Jones, W. C. Maxwell, Earle Love, William Cheek, Members; Plummerville School District No. 39, Doyle Border, Superintendent; William P. Evans, Jack Gordon, Frank Deaver, Charles Townsley, Billy Garrett, Members,

Appellants,

vs.

United States of America,

Appellee.

} Appeal from the United States District Court for the Eastern District of Arkansas.

Submitted: June 12, 1979

Filed: June 13, 1979

Before GIBSON, Chief Judge, LAY, HEANLEY, BRIGHT, ROSS, STEPHENSON and McMILLIAN, Circuit Judges, *en banc*.

ORDER

This matter came before the Court en banc on oral argument and briefs of the parties in St. Paul, Minnesota, on June 12,

1979; upon hearing and review of the briefs and the record, the Court orders that:

1) the order of this Court entered on June 13, 1979 partially staying the District Court's order of March 5, 1979 is hereby vacated;

2) the District Court's order of March 5, 1979, which *inter alia* ordered the consolidation of the East Side, Plummerville and Morrilton school districts is hereby reinstated and affirmed, with the following modifications:

a) The consolidation of school districts at the high school level shall be accomplished so as to be effective at the beginning of the school year commencing in August, 1979.

b) The consolidation of school districts at the elementary and grade school level shall be accomplished so as to be effective at the beginning of the school year commencing in August, 1980.

The Court, recognizing that much of the delay involved in the disposition of this case was not the responsibility of the school districts, finds that a two-step implementation of the District Court's order will result in a more orderly and effective desegregation of the school districts.

The opinion of this Court will be filed at a later date.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

No. 79-1293

Morrilton School District No. 32, Terry A. Humble, Superintendent; W. O. Byrd, Dr. H. B. White, Hugh C. Jones, W. C. Maxwell, Earle Love, William Cheek, Members; Plummerville School District No. 39, Doyle Border, Superintendent; William P. Evans, Jack Gordon, Frank Deaver, Charles Townsley, Billy Garrett, Members,

Appellants,

vs.

United States of America,

Appellee.

Appeal from the United States District Court for the Eastern District of Arkansas.

Submitted: June 12, 1979

Filed: June 18, 1979

Before GIBSON, Chief Judge, LAY, HEANEY, BRIGHT, ROSS, STEPHENSON and McMILLIAN, Circuit Judges, *en banc*.

Amended Order

This matter came before the Court *en banc* on oral argument and briefs of the parties in St. Paul, Minnesota, on June 12,

1979; upon hearing and review of the briefs and the record, the Court orders that:

1) the order of this Court entered on May 23, 1979, partially staying the District Court's order of March 5, 1979 is hereby vacated;

2) the District Court's order of March 5, 1979, which *inter alia* ordered the consolidation of the East Side, Plummerville and Morrilton school districts is hereby reinstated and affirmed, with the following modifications:

a) The consolidation of school districts at the high school level shall be accomplished so as to be effective at the beginning of the school year commencing in August, 1979.

b) The consolidation of school districts at the elementary and junior high school levels shall be accomplished so as to be effective at the beginning of the school year commencing in August, 1980.

The Court, recognizing that much of the delay involved in the disposition of this case was not the responsibility of the school districts, finds that a two-step implementation of the District Court's order will result in a more orderly and effective desegregation of the school districts.

The opinion of this Court will be filed at a later date.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

United States Court of Appeals
For the Eighth Circuit

No. 79-1293

Morrilton School District No. 32, Terry A. Humble, Superintendent; W. O. Byrd, Dr. H. B. White, Hugh C. Jones, W. C. Maxwell, Earle Love, William Cheek, Members; Plummerville School District No. 39, Doyle Border, Superintendent; William P. Evans, Jack Gordon, Frank Deaver, Charles Townsley, Billy Garrett, Members,

Appellants,

vs.

United States of America,

Appellee.

Appeal from the United States District Court for the Eastern District of Arkansas.

Submitted: June 12, 1979

Filed: August 30, 1979

Before GIBSON, Chief Judge, LAY, HEANEY, BRIGHT, ROSS, STEPHENSON and McMILLIAN, Circuit Judges, *en banc*.

HEANEY, Circuit Judge.

The United States brought this civil action on December 27, 1972, pursuant to Section 407 of the Civil Rights Act of 1964, 42

U.S.C. §2000c-6, to desegregate the public schools of Conway County, Arkansas. Named as defendants were the State of Arkansas, the Arkansas State Board of Education and its members, the Director of Education of Arkansas, the Conway County Board of Education and its members and secretary, and each of the six school districts of Conway County[1] and their governing boards and chief administrative officers.

Conway County is a predominantly rural county. At the time the complaint was filed, total enrollment of the County's schools was 3,915 students. The racial composition of the student body and faculty of each of the six school districts was as follows:

	Student Body		Faculty	
	# White	# Black	# White	# Black
Morrilton	2,067	315	96	5
East Side	1	313	1	17
Plumerville	235	151	13	2
Conway County	79	93	6	5
Nemo Vista	282	26	13	0
Wonderview	314	39	18	0
	2,978	937	147	29

Of the 172 Conway County District students, eighty-one black and four white students attended the Center School and were taught by four black and two white teachers. The government alleged that the East Side School District and the Center School of the Conway County District were established by the State of Arkansas as black components of a dual school system in Conway County and had been maintained as all-black vestiges of that dual system.

[1] Conway County No. 1, Wonderview No. 2, East Side No. 5, Nemo Vista No. 8, Morrilton No. 32 and Plumerville No. 39.

The District Court agreed. Relying primarily on the history of the development of the school districts, and on the nature of the boundaries of each school district, it concluded that the racial segregation present in the East Side District and the Center School of the Conway County District

> is a continuing result of State imposed racial segregation, and that its present existence is the result of inertia and of lack of State machinery to bring about a change in the situation in a context other than consensual.

The court ordered immediate correction of the racial segregation of the Conway School District.[2] It further ordered the defendants to file a plan, or plans, for the elimination of the unconstitutionality of the East Side District.

The Morrilton, Plumerville, East Side and Nemo Vista School Districts filed proposed plans. After analysis of those plans, and upon compilation of additional information, the United States submitted alternate plans.

A hearing was held by the District Court on the merits of the various proposals on March 1 and 2, 1979. The court entered an order on March 6, 1979, adopting the basic outline of Government Plan B, which provides for the retention of the Wonderview and Nemo Vista Districts with little change and the consolidation of the Morrilton, Plumerville and East Side Districts. Morrilton and Plumerville appeal.

The first issue on appeal is the correctness of the District Court's finding of purposeful segregation and the propriety of

[2] The court ordered that one of the two schools in that district be closed and one transferred to the Wonderview District. Students residing in the Hickory Hill portion of the County District, which was bounded on three sides by the Morrilton District, were ordered transferred to Morrilton. The Conway County District has not operated public schools since 1973, and its disestablishment has not been appealed.

its order of interdistrict relief to remedy that segregation. Morrilton and Plumerville argue that the all-black condition of the East Side District is not the result of discriminatory action. They further argue that, even assuming the unconstitutionality of the segregation in the East Side District, since the government made no showing that either Morrilton or Plumerville participated in the development of the East Side District as a segregated district, the District Court's imposition of interdistrict relief was unwarranted.

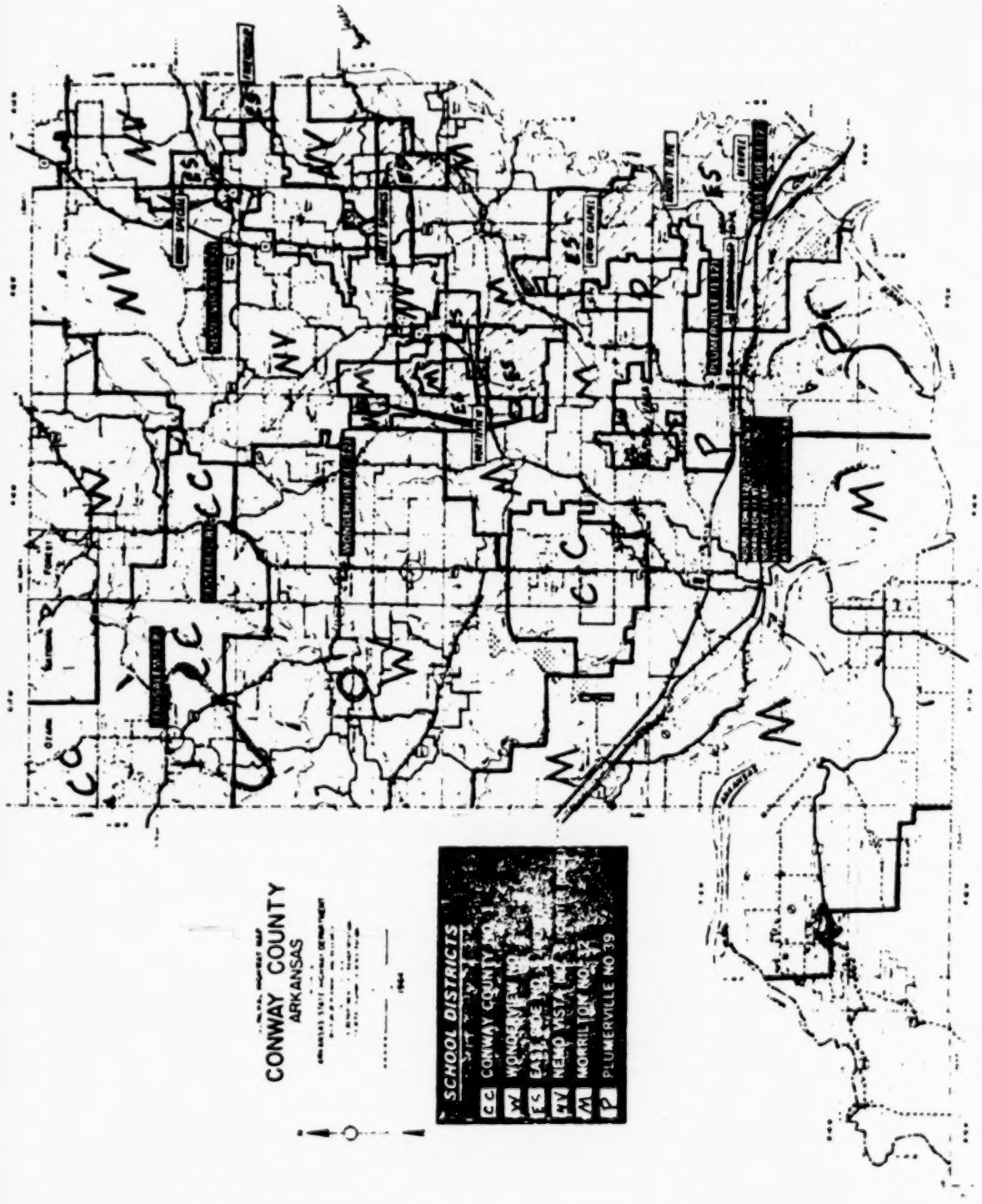
At one time, there were over 3,000 school districts in Arkansas. The state gradually required smaller districts to consolidate in an effort to eliminate inefficiency and to insure every child a twelfth-grade education. The school districts of Conway County are the result of a series of three major consolidations, the first occuring in the 1920's, the second in the 1930's and the final one in 1949 under the Initiated Act No. 1 of 1948, Ark. Stat. Ann. §§80-426 to -429 (Repl. 1960). The last consolidation was designed to eliminate districts having fewer than 350 students.

The Arkansas laws paving the way for consolidations were racially neutral on their face; there was no requirement written into the statutes that districts be consolidated along racial lines.[3] However, from 1868 until the Supreme Court issued its opinion in *Brown* v. *Board of Education,* 347 U.S. 483 (1954) [*Brown I*], Arkansas law required that separate schools "for white and colored persons" be established by the board of directors of each school district. Ark. Stat. Ann. §80-509. Prior to the three major consolidations, there were at least ninety-two school districts in Conway County. Most, if not all, were one-school districts and had to be either white or "colored." The requirement that districts maintain separate schools clearly influenced the consolidations which occurred in Conway County in the 1920's,

[3] Initiated Act No. 1 of 1948 [Ark. Stat. Ann. §§80-426 to -429 (Repl. 1960)]; 1931 Ark. Acts, Act 169; 1927 Ark. Acts, Act 152.

1930's and 1940's. Black districts tended to consolidate with black districts, and white with white, at least in part to avoid the expense of maintaining separate schools.[4] The influence of §80-509 is starkly visible on the map showing the boundary lines of the six school districts as they existed in 1972.

[4] Morrilton and Plumerville operated dual school systems in compliance with this statute; the other school districts transferred their black students to black schools in other districts. Some years after *Brown I*, Morrilton and Plumerville ceased operating dual school systems and interdistrict transfers ceased.



The District Court based its finding of purposeful segregation in large part on those boundary lines, saying

> The geographical arrangement of the Conway County districts resembles a crazy quilt, and the resemblance results from the gerrymandering of district lines in years past in deference to the requirement of segregation; there can be no other explanation for it.
>
> The school district map introduced in evidence shows that the Menifee District [East Side], while centered at Menifee, is scattered in fragments all over the eastern and central parts of the County. Parts of it are surrounded by the Nemo Vista, Morrilton, and Plumerville Districts. At one point it is cut in two by Morrilton. The fragments of the Menifee District surrounded by parts of other districts are enclaves of Negroes residing in generally white neighborhoods, and the predecessors of Menifee students residing in those enclaves were explicitly assigned to Menifee on the basis of the fact that they were Negroes.

We agree that the pattern of consolidations shows the impact of §80-509. The Nemo Vista District was the result of the consolidation of fourteen all-white school districts; Wonderview of the consolidation of seventeen all-white districts. East Side was the product of the consolidation of twelve all-black districts. That race was a factor in the pattern of consolidation is evident in the history of one of the older districts: in 1924, S.D. #5 split into four sections, the all-black Union Special #87 consolidated with East Side, while the all-white Austin #72 and Center Ridge #2 consolidated with Nemo Vista, an all-white district. As a result of this and other consolidations of the black districts into the East Side District, some black children now travel twenty-five miles by bus in each direction, passing predominantly white schools in the process.

We recognize that consolidations in three of the six school districts did not occur along strictly racial lines: Morrilton was the result of the consolidation of sixteen white districts, ten mixed districts and one black district; Plumerville, the consolidation of four white districts, one black district and one mixed district; and Conway County, the consolidation of seven white districts and two black districts. However, the map clearly shows that absent racial considerations, several areas would have consolidated with Morrilton, Nemo Vista or Plumerville instead of East Side.

The case closest on its facts to this case is *Haney* v. *County Board of Education of Sevier County, Arkansas,* 410 F.2d 920 (8th Cir. 1969). There, fourteen school districts consolidated in 1949 to form one black district (Sevier County) and one mixed district (Lockesburg). Black children from the Lockesburg District attended the Sevier County schools until 1954 and 1955, when, at the initiative of the Superintendent of the Lockesburg District, the Sevier County Board of Education approved the transfer of the property of black property owners to the Sevier County District. This resulted in the Sevier School District having irregularly shaped and noncontiguous areas. We held under the circumstances that

> [s]chool district reorganization took place under the color of state law that then required segregated schools. Under these circumstances, when the resulting district lines drawn reflect a discriminatory pattern, *de jure* segregation is established.

410 F.2d at 924.

The district lines in Conway County similarly reflect a discriminatory pattern. Furthermore, there has been no effort on the part of the public officials responsible to correct the segregation. Present day evidence of a continuing racial segregation in Conway County is manifest in the racial composition of

the faculty of the various school districts. Nemo Vista and Wonderview had no black faculty members at the time the complaint was filed. Plumerville had only two black faculty members, whereas East Side had only one white teacher. Morrilton, by far the largest district, had only five black teachers out of a faculty of 101. For these reasons, we hold that the District Court correctly found unlawful segregation to exist in Conway County.

We turn to the question of the propriety of interdistrict relief. The Supreme Court, in *Milliken* v. *Bradley,* 418 U.S. 717, 744-745 (1974) [*Milliken I*], held that

> [t]he controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann,* 402 U.S., at 16. Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.

The violation here is clearly interdistrict in nature. East Side is almost entirely black and includes territory that would properly have been absorbed by the surrounding districts were it not for racial considerations. The boundaries of the East Side District, and consequently, the boundaries of the other school districts in Conway County, were not neutrally drawn. Thus, the prohibition against interdistrict relief pronounced in other cases, *see, e.g., Milliken I, id; Bradley* v. *School Board of City of Richmond, Va.*, 462 F.2d 1058 (4th Cir. 1972), *aff'd without opinoin by an equally divided court*, 412 U.S. 92 (1973); *Tasby* v. *Estes*, 412 F.Supp. 1185 (N.D. Tex. 1975), aff'd, 572 F.2d 1010 (5th Cir. 1978), *cert. granted sub nom., Estes* v. *Metropolitan Branches of Dallas NAACP*, 99 S.Ct. 1212 (1979), is not applicable here. Interdistrict relief is appropriate and necessary to remedy the constitutional violation. *See Haney* v. *County Board of Education of Sevier County, Ark., supra; United States* v. *State of Missouri*, 515 F.2d 1365 (8th Cir.), *cert. denied sub nom., Ferguson Reorganized School Dist.* v. *United States*, 423 U.S. 951 (1975); *Newburg Area Council, Inc.* v. *Board of Education of Jefferson Co., Kentucky*, 510 F.2d 1358 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975).

Morrilton and Plumerville argue that since there was no evidence implicating them in a direct way with the establishment of the East Side District,[5] the court has no authority to order them to remedy the state's wrong. This argument is clearly without merit since the effects of the unconstitutional state action are felt in both districts. As the Court stated in *United* States v. *Board of School Commissioners*, 573 F.2d 400, 410 (7th Cir.), *cert. denied sub nom., Bowen* v. *United States*, 99 S.Ct. 93 (1978):

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[5] The government stipulated that neither Morrilton School District, nor its Board of Directors, nor its administration, participated in the formation or establishment of East Side subsequent to 1939 within the period of time subject to discovery. The government also stipulated that there was no transfer or exchange of territorial jurisdiction between Morrilton School District and the East Side School District. The evidence does show that the Plumerville District regularly sent its black students to the East Side high school, that both Morrilton and Plumerville operated dual school systems until the 1960's and that faculty segregation persisted at least through trial.

> [S]chool officials may not maintain that their districts should be excluded from any interdistrict remedy if they are found innocent of committing any constitutional violations because they should not be held responsible for the acts of the state legislators or other state subdivisions such as a local housing authority or a zoning board. The commands of the Fourteenth Amendment are directed at the state and cannot be avoided by a fragmentation of responsibility among various agents. *Cooper* v. *Aaron*, 385 U.S. 1, 15-17, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958). If the state has contributed to the separation of the races, it has the obligation to remedy the constitutional violations. That remedy may include school districts which are its instrumentalities and which were the product of the violation.

The final issue is whether the remedy ordered by the District Court is too broad. Morrilton and Plumerville argue that the District Court ordered the most intrusive and complicated desegregation plan offered, and that the nature of the relief exceeds the scope of the constitutional violation.

The basic principles applicable in determining the scope of relief have been clearly set forth by the Supreme Court. The goal is the elimination of all vestiges of state-imposed segregation. *E.g., Brown I, supra; Brown* v. *Board of Education*, 349 U.S. 294 (1955) [*Brown II*]; *Green* v. *County School Board*, 391 U.S. 430 (1968); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). A district court has broad equitable powers in ordering the elimination of the vestiges of state-imposed segregation; however, those powers are limited by the principles that (1) the nature of the desegregation remedy is

to be determined by the nature and the scope of the constitutional violation, *id.* at 16; *Milliken* v. *Bradley,* 433 U.S. 267, 280 (1977) [*Milliken II*]; (2) the remedy must, to the greatest degree possible, be designed "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken I, supra,* 418 U.S. at 746; and (3) in devising the remedy, federal courts must take into account the interest of state and local authorities in managing their own affairs, consistent with the constitution. *Milliken II, supra,* 433 U.S. at 280-281.

Here, the nature of the violation was the consolidation of school districts on the basis of race. As a study of the map of the school district boundaries indicates, the effects of that consolidation were manifested primarily in the boundaries and racial composition of the Morrilton, Plumerville and East Side Districts. East Side is almost all black, and Morrilton is disproportionately white. All three districts have highly irregular boundaries. The remedy ordered by the District Court reflected these facts. It provided for the retention of the boundaries of the Wonderview District, slight enlargement of the Nemo Vista District, and consolidation of the Morrilton, Plumerville and East Side Districts.[6] Desegregation of the East Side District could not be accomplished unless either consolidation or a major shift in the boundaries of the Morrilton, Plumerville and East Side Districts occurred. No viable plan utilizing the latter alternative was offered. In light of these facts, we cannot agree with the appellants that the remedy exceeds the scope of the violation. The consolidation order was consistent with our holdings in *Haney* v. *County Board of Education of Sevier County, Ark., supra,* and the *United States* v. *State of Missouri, supra.*

[6] Most of the plans submitted by parties called for some type of consolidation. The controversy generally was whether the consolidation should be fairly broad in scope, as the government suggested, or whether, at most, only East Side and Plumerville should be consolidated.

Nor can we agree that the remedy was unduly intrusive. The defendants had known since the District Court's 1973 order that the unconstitutional segregation of the East Side District would have to be remedied. They were unable to agree upon a suitable remedy. Instead, each district offered a plan suited to its own best interests. Extensive expert testimony was offered in support of the various plans submitted by the parties. After hearing the evidence, the District Court chose the government's plan, which was unbiased and which was favored by two of the districts over the plans submitted by the other districts. The government plan also compared favorably to the plans initially offered by the other parties in an analysis undertaken by the Arkansas State Board of Education. The court found that Government Plan B would result in the most complete and equitable integration of the students of Conway County, would be the most likely to prevent future resegregation, would be the most consistent with educational objectives and would result in the possibility of the most efficient use of existing personnel and facilities.

We must give deference to the District Court's findings of fact, which can be set aside only if clearly erroneous. Fed.R.Civ.P. 52 (a); *United States* v. *State of Missouri, supra,* 515 F.2d at 1371. As Mr. Justice Stewart pointed out in his concurring opinion in *Columbus Board of Education* v. *Penick,* 47 U.S.L.W. 4924 , 4929 (1979),

> [t]he development of the law concerning school segregation has not reduced the need for sound factfinding by the district courts, nor lessened the appropriateness of deference to their findings of fact. To the contrary, the elimination of the more conspicuous forms of governmentally ordained racial segregation over the last 25 years counsels undiminished deference to the factual adjudications of the federal trial judges in cases such as these, uniquely situated as those judges are to appraise the societal forces at work in the communities where they sit.

Morrilton and Plumerville have not convinced us that the District Court's findings are clearly erroneous. They argue that the remedy is defective because of all the proposed remedies, it results in the greatest loss of local autonomy. It is true that "local autonomy of school districts is a vital national tradition." *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406, 410 (1977)' *Milliken I, supra,* 418 U.S. at 741-742. However, as the Court stated in *Milliken I, id.* at 744,

> [s]chool district lines and the present laws with respect to local control, are not sacrosanct and if they conflict with the Fourteenth Amendment federal courts have a duty to prescribe appropriate remedies.

The consolidation of Morrilton, Plumerville and East Side was necessary to cure the constitutional violations. Loss of local autonomy is insufficient justification standing alone to overturn the remedy ordered by the District Court.

Morrilton and Plumerville also attack certain details of the remedy ordered by the District Court. They argue, initially, that the court's order imposes a requirement on all five of the districts to establish and maintain a racial balance in each school and grade of not less than thirteen percent nor more than thirty-three percent black. Morrilton and Plumerville argue that this order is in conflict with the teachings of *Swann* v. *Charlotte-Meckleburg Board of Education, supra,* and *Milliken I, supra,* that racial balance is not constitutionally required and that transitional requirements imposed are not to be continued in perpetuity.

The District Court ordered that

> [i]n creating attendance zones, or if assignment policies are used other than zones, you must keep the percentage of blacks in each school and each grade at not less than 13 percent or greater than 33%. This requirement, I should point out to the people at Wonderview and Nemo Vista, is required in their districts also.

We do not construe this order of the District Court as requiring, as a matter of constitutional right, a particular racial balance. *Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. at 24. The court acted within its discretion in ordering the districts to assure a certain racial composition, with a variation permitted among schools and grades. Likewise, we do not read the District Court's order as requiring the districts to permanently maintain a certain racial balance. The court's order was primarily concerned with integrating the districts and prohibiting discriminatory acts in the future. It did not require that the racial balance it set forth be maintained in perpetuity.

Finally, Morrilton and Plumerville argue that compliance with the District Court's order that implementation of the plan be accomplished by the beginning of the school year commencing in August, 1979, is impossible. This appeal was not argued until June 12, 1979, less than three months before the beginning of the 1979 school year. The Court recognizes that much of the delay involved in the disposition of this case was not the responsibility of the school districts,[1] and finds that a two-step implementation of the District Court's order will result in the more orderly and effective integration of the school districts. Therefore, the court affirms the District Court's order requiring integration of the Morrilton, Plumerville and East Side Districts but modified the order to provide that

(a) The integration of the high schools within the newly consolidated district shall be accomplished so as to be effective at the beginning of the school year commencing in August, 1979;

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[1] The case was originally assigned to the Honorable J. Smith Henley. Upon his appointment to this Court, it was assigned to the Honorable Terry Shell, who died before taking any action on the case. The case was then assigned to the Honorable Garnett Thomas Eisele, who heard it as promptly as an impossible caseload would permit.

(b) The integration of the elementary and junior high schools shall be accomplished so as to be effective at the beginning of the school year commencing in August, 1980; and

(c) The school board shall consist of the members designated by Judge Eisele through the school year or until such time as the schools have been fully integrated in accordance with the order of the District Court and of this Court. The election for school board members in the new consolidated district shall be held at the first date after the integration is complete and the school board elections are regularly scheduled in the State of Arkansas. The board shall be elected and constituted in accordance with constitutional standards and on the basis of a plan submitted by the district to the District Court for its approval.

Affirmed in part and reversed in part. Costs will be taxed to the appellants.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX D

In the United States District Court
Eastern District of Arkansas
Western Division

United States of America,
Plaintiff,
v.
State of Arkansas et al.,
Defendants.
LR-72-C-290

Memorandum Opinion

(Filed July 26, 1973)

This is an action brought by the United States pursuant to Title IV of the Civil Rights Act of 1964, 42 U.S.C.A., section 2000c-6, to compel the elimination of alleged racial discrimination against Negro public school students attending the school complex operated by East Side School District No. 5 of Conway County, Arkansas, and the Center School operated by Conway County School District No. 1.

The complaint names two groups of defendants, the "State defendants" and the "local defendants." The State defendants originally named were the State of Arkansas itself, the State Department of Education, the members of the Arkansas State Board of Education, and the Arkansas Director of Education.

The local defendants named are: Conway County School District No. 1; Wonderview School District No. 2; East Side School District No. 5, which the Court will refer to as the Menifee District because its school complex is located in the Menifee community in southeastern Conway County; Nemo Vista School District No. 8; Morrilton School District No. 32; Plumerville School District No. 39; the members of the Conway

County Board of Education; and the members of the Boards of Directors and the Superintendents of Schools of the respective school districts.

The complaint alleges, and the Court finds, that the Menifee District was organized in 1930 as a result of the consolidation of eight one school all black districts, and that a ninth all black district was added in 1949 pursuant to a consolidation required by the operation of Arkansas Initiated Act No. 1 of 1948, Ark. Stats., Ann, section 80-426. It is further alleged that the Menifee District has remained an essentially all black district ever since, notwithstanding desegregation decisions of the Supreme Court of the United States and other courts.

With respect to the Center School operated by the County District it is alleged in substance that that school is racially indentifiable as a school designed and used for the education of black elementary school students.

The Government says that the situations above described are the direct result of Arkansas' pre-*Brown*[1] requirement of racial segregation in the public schools; that those situations are unconstitutional; and that the State and its subdivisions are under an obligation to eliminate the alleged unconstitutionalities and should be required to do so, and that the action to be required may and in all probability will affect all of the operating school districts in Conway County.

After process was served, answers were filed by all of the local defendants, except Morrilton District[2] which filed a motion to dismiss the complaint. That motion was overruled, and Morrilton then filed its answer.

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[1]Brown v. Board of Education, 1954, 347 U.S. 483, and Brown v. Board of Education, 1955, 349 U.S. 294.

[2]At times the Court will refer to the Morrilton District simply as Morrilton. When the Court uses that term, it refers to the District and not to the City of Morrilton where the District has its headquarters and which is the County Seat of Conway County.

The State defendants moved to dismiss the complaint as to them, taking the position that under Arkansas law they have nothing to do with the local school organization which is a matter left to County Boards of Education, local school districts, and local voters. The Court granted the motion as to the State itself and as to the State Department of Education. The Court denied the motion as to the individual members of the State Board of Education and as to the State Director of Education, and they then filed an answer.

In that pleading the remaining State defendants take essentially the same position that they took in their motion to dismiss. The Court finds that their position is well taken to a point, but adheres to its view that they should remain in the case. The Government argues that the State and the Department of Education should be brought back into the litigation. The Court is persuaded, however, that if it turns out ultimately that the Government is entitled to relief at the State level such relief will be obtainable by the operation of the Court's decree on the State defendants who are now before the Court.

In their answer the County District and the members of the County Board of Education allege that they are operating the Center School and Jerusalem School, both elementary schools, with the approval of the Department of Health, Education and Welfare. As far as the overall structuring of the Conway County Schools is concerned, they allege that there have never been any territorial exchanges between or among the districts which are defendants here; and they deny that students have ever been transferred from one district to another on account of race.

Wonderview, Nemo Vista, Morrilton, and Plumerville take the position that they had nothing to do with the formation of the Menifee District or the County District; that they have not ceded territory to either of those districts or received cesssions of territory from them; that their own districts are satisfactorily integrated; and that their own territorial integrity should not be

impaired for the purpose of correcting racial imbalances in other districts. Largely in reliance on Bradley v. School Board of the City of Richmond, 4 Cir., 1972, 462 F. 2d 1058, affirmed without opinion by an equally divided Supreme Court, 1973, _____ U.S. _____, they say that this Court is neither constitutionally required nor empowered to grant the relief sought by the Government to the extent that the Government is seeking a restructuring of the overall public school organization in Conway County.

As will more fully appear, the Menifee District is essentially an all black district, and the members of its Board of Directors and its Superintendent of Schools are black. Those defendants are in a somewhat anomalous and perhaps difficult position. They do not want to appear to be defending racial discrimination. On the other hand, they do not want to see their district destroyed, and they particularly do not want to see the Menifee school complex, which has been in existence for many years, eliminated.

The case has been tried to the Court and submitted on the pleadings, oral testimony, and documentary evidence. At the conclusion of the trial the Court invited the parties to file briefs. Briefs have been filed by the State defendants, by the Morrilton District, and by the County District. The other defendants have not filed briefs.[3]

The Court finds ultimately that the Government is entitled to relief. The Government's brief contains detailed requests for findings of fact and conclusions of law. The Court now adopts as subsidiary findings of its own those requested findings of the Government which set out historical facts and which refer to

[3]No briefs were filed by Wonderview, Nemo Vista, Plumerville, or Menifee. The Court assumes that the position of the first three of the defendants just mentioned is the same as that taken by Morrilton.

specific provisions of the public school laws of Arkansas. The Court prefers to state its own conclusions of law and to discuss the issues in its own terms.

The underlying legal principles that are applicable to this case are too well settled by now to require any detailed discussion or any list of citations of decisions of the Supreme Court, of the several Courts of Appeals, or of the District Courts dealing with public school integration.

State imposed racial segregation in public schools, whether ingenious or ingenuous, is unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Where it exists the States and their political subdivisions are under an affirmative duty to disestablish it and prevent its recurrence. If they do not do so voluntarily, the federal courts have jurisdiction to do so and are required to do so by appropriate means available to them.

The issues in the case must be considered against their historical back-drop.

Article 14, Section 1 of the Arkansas Constitution of 1874 requires the State to maintain a system of free public education; as indicated, that system must be operated in a racially nondiscriminatory manner. The public policy of Arkansas has always favored maximum local control of public schools, and the local school district, such as the one involved here, is the basic unit of the Arkansas system. Arkansas local school districts are governed by elected directors who lay down local school district policies and who employ the local superintendent of schools and other district employees. The local districts are agencies of the State.

Each of the 75 counties of Arkansas has an elected County Board of Education. The County Board has primary jurisdiction in such areas as the organization of local school districts, the changing of district boundaries, and consolidation of

districts. It also must approve transfers of students from one district to another. [With regard to consolidation of districts it may be said generally that a consolidation may not be effected in Arkansas without the approval of a majority of the voters in both districts.] The County Boards of Education are State agencies.

The State Board of Education, the members of which are before the Court, is also an agency of the State, and certain rather broad powers have been conferred upon it by statute. It performs a number of important public school functions, including certain fiscal functions, and by Ark. Stats., Ann., section 80-113, it has been given, among other things, "general supervision of the public schools of the State." However, the State Board has nothing to do with the structuring of local school districts.

Between 1868, when Arkansas first established a rudimentary system of free public schools, and 1954 when Brown I was decided, Arkansas law imposed racial segregation on its schools. The law did not require segregation by districts, and many larger districts in the State maintained dual systems of "separate but equal" schools for the education of white and Negro students. [However, there were a great many districts organized in Arkansas, including districts organized in Conway County, which had only one school.] Since such a school could be attended only by children of the same race, a one school district was automatically either a "white district" or a "black district," and with respect to such a district "segregation by school" and "segregation by district" amounted to the same thing.

The development of public education in Arkansas has been characterized by school consolidations designed to eliminate small and inefficient districts and to create a situation in which every district in the State will be able to offer its students a 12

grade education. And all of the districts with which the Court is concerned, except the County District, have school systems or complexes extending from Grade 1 through 12.

The six districts before the Court are the end result of a series of consolidations which started out when Conway County had 90 or more separate school districts, many of which were one school racially identifiable districts. According to the testimony of Education Director A. W. Ford, there have been three waves of consolidation in Arkansas. The first took place in the '20's, the second in the '30's, and the final one occurred in 1949 under the impetus of Initiated Act No. 1 of 1948 which was designed to eliminate districts having less than 350 students.

In the consolidation process in Conway County, as elsewhere in the State, there was a tendency to consolidate white districts with white districts and black districts with black districts. That was done in deference to the Arkansas requirement of within district segregation, and it spared the consolidated district the expense of maintaining and operating a dual school system.

As heretofore stated, the Menifee District was formed by consolidations of all black districts. Nemo Vista and Wonderview resulted from consolidations of all white districts. Menifee, Nemo Vista, and Wonderview never operated *dual* school systems, but such systems *were* operated by *Morrilton* and *Plumerville*.

The County District was formed as a result of the operation of Initiated Act No. 1 of 1948. That statute required districts having less than 350 students to consolidate or merge into larger districts. If a small district affected by Act 1 was unable to consolidate with or merge with another district, it automatically was placed, with other districts in the county similarly situated, in a "County District" operated by the County Board of Education.

The *Conway County District* resulted from the consolidation of Center School District No. 79 (Negro), Lord School District No. 9 (white), Hickory Hill School District No. 7 (Negro), Jerusalem School District No. 28 (white), and Catholic Point School District No. 7 (white).

The Act 1 consolidations affected other districts in the County as follows: Menifee annexed North View School District No. 10 (Negro); Wonderview annexed St. Vincent School District No. 48 (white); Nemo Vista annexed Van Buren School District No. 63 (white); and Morrilton annexed St. Elizabeth School District No. 14 (white).

The Court has talked to some extent about racially identifiable one school districts. With regard to such districts it is not to be supposed that their territories were necessarily occupied entirely by blacks in the case of black districts or entirely by whites in the case of white districts. That situation did not prevail in many one school districts. Where the number of students of the minority race, whether white or black, living in a particular district was very small, it was obviously unfeasible for the district to operate two school systems. The problem was solved by transferring students from one district to another; white children would be transferred to white districts, and black children would be transferred to black districts.

The record here reflects that that practice was followed religiously in Conway County for years before and after the 1949 consolidations and both before and after the Brown decision outlawed de jure segregation in Arkansas and elsewhere. In the course of the trial the Court was somewhat surprised to learn that not only were students transferred from district to district but also that the school taxes paid by their parents were transferred with them. The legality of that practice under Arkansas law may be questionable. Arkansas law provides for the transfer of students, but the Court has not been aware that it permitted corresponding transfers of tax money.

An examination of a map of Conway County showing school district lines and a consideration of other evidence make it clear that the pre-*Brown* de jure segregation requirement of Arkansas law deeply impressed the structuring of the schools of Conway County, and that impression is still clearly visible today.

In point of fact the Brown decisions of the Supreme Court and decisions of the Court of Appeals for this Circuit and of this Court in early school desegregation cases were simply ignored in Conway County until about the mid-60's when some degree of intra-district integration was achieved largely under pressure from the Department of Health, Education and Welfare. However, nothing approaching "racial balance" has been achieved in any of the six districts with the possible exception of the Plumerville District.

Figures of record reveal that during the 1972-73 school year just past the total enrollment in the County's schools was 3783 students. 932 of those students, a little more than 24 percent, were black. 331 of those black students, 35.5 percent of the total black enrollment, attended the Menifee school. Another 15 percent of them, 139, were enrolled at Plumerville. Of the remaining 462 black students 95 were enrolled in the Jerusalem School and the Center School operated by the County District, and they made up a substantial majority of the County District's student body. 298 of them were enrolled in the Morrilton District, 26 were enrolled at Nemo Vista, and 43 were enrolled at Wonderview. Only five white students were enrolled at Menifee.

Bearing in mind the fact that Negroes make up about 24 percent of the County's total student population, the same figures reveal that blacks made up less than 10 percent of the enrollment at Nemo Vista, about 12.5 percent of the enrollment at Wonderview, and about 13 percent of the enrollment at Morrilton. At Plumerville, on the other hand, blacks made up about 36 percent of the total enrollment last year.

Last year's faculty figures are also of interest. While blacks made up about 13 percent of Morrilton's enrollment, only five members of Morrilton's faculty of 106 were black. At Menifee, on the other hand, 19 members of the District's faculty of 20 were black. There were no black teachers at either Nemo Vista or Wonderview. At Plumerville there were only two black faculty members notwithstanding the relatively large black enrollment. At the Center School last year where no white students were enrolled, there were four black teachers and one white teacher; and at the Jerusalem School attended by 59 white and 10 black students, there were four white teachers and one black teacher.

The geographical arrangement of the Conway County districts resembles a crazy quilt, and the resemblance results from the gerrymandering of district lines in years past in deference to the requirement of segregation; there can be no other explanation for it.

The school district map introduced in evidence shows that the Menifee District, while centered at Menifee, is scattered in fragments all over the eastern and central parts of the County. Parts of it are surrounded by the Nemo Vista, Morrilton, and Plumerville Districts. At one point it is cut in two by Morrilton. The fragments of the Menifee District surrounded by parts of other districts are enclaves of Negroes residing in generally white neighborhoods, and the predecessors of Menifee students residing in those enclaves were explicitly assigned to Menifee on the basis of the fact that they were Negroes.

The County District has three distinct segments, two of which are substantially separated from the segment in which the two schools operated by the District are located. One of those segments is surrounded by Nemo Vista and fragmented parts of Menifee; access by road from that segment to the District's schools is not good. The other segment is entirely surrounded by Wonderview and Morrilton.

Another map in evidence shows certain school bus routes in the County. That map reveals that Negro students living in the more northern fragments of the Menifee District are transported practically from one end of the County to the other in going to and from school. The route turns and twists from its northern terminus to the Menifee school; it passes through parts of the Nemo Vista, Morrilton, and Plumerville Districts and passes in close proximity to if not directly by both the Nemo Vista and the Plumerville schools before it reaches Menifee. The same map shows that students residing in one of the detached segments of the County District are transported to school completely across the southern part of the Wonderview District and in close proximity to the Wonderview school.

What has been said to this point brings into focus the two questions which the Court must decide: First, does the overall situation that prevails in Conway County amount to unconstitutional racial discrimination against Negroes residing in the Menifee District and those attending the Center School in the County District?[4] Second, if it does, then what remedy should be prescribed to eliminate the discrimination?

The Government argues that the decision of the Court of Appeals in Haney v. County Board of Education of Sevier County, Arkansas, 8 Cir., 1969, 410 F. 2d 920, requires an affirmative answer to the first question, and suggests the answer to the second. The local defendants would distinguish *Haney* from this case, and also, as indicated, rely largely on Bradley v. School Board of the City of Richmond, supra.

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[4]From its reading of the complaint, the Government's requests for findings and conclusions, and the Government's brief, the Court does not understand that the Government claims in this action that the existing situation discriminates against Negroes residing or attending school in the other districts or those attending the Jerusalem school. Nor does the Court understand that the Government is attacking the County District, as such, in the sense that it is attacking the Menifee district.

The Court finds it convenient first to dispose of the defendants' contention based on *Bradley*. In that case the United States District Court for the Eastern District of Virginia ordered the consolidation of three unitary Virginia school districts for the purpose of achieving racial balance in the schools of all three districts. Bradley v. School Board, E.D.Va., 1972, 338 F.Supp. 67. The Court of Appeals, one Judge dissenting, reversed. When the case reached the Supreme Court, Mr. Justice Powell did not participate in its consideration, and the vote of the Chief Justice and seven Associate Justices split 4-4 which automatically affirmed the decision of the Court of Appeals.

This Court will assume without deciding that the decision of the majority of the Court of Appeals will remain the law on the state of facts presented by the record in the Bradley case. But the Court is of the opinion that the facts of *Bradley* are not the facts of this case. The three districts involved in that case were not formed as either white districts or black districts, whereas the Menifee District involved here was established from the beginning as a black district, and other districts in Conway County were formed as white districts. In the Court's estimation that distinction takes *Bradley* out of the case.

Taking up, first, the Menifee situation, there can be no question that it was formed as a black district, and that it remains an identifiable black district today. As has been seen its Board of Directors is made up of Negroes, its Superintendant of Schools is a black man, 19 of its 20 faculty members last year were black, and 331 of its 336 students last year were black. As has also been seen the territory of the district is highly fragmented due to gerrymandering of district lines in the interest of preserving segregation.

The Court finds that the Menifee District today is a continuing result of State imposed racial segregation, and that its present existence is a result of inertia and of lack of State machinery to bring about a change in the situation in a context other than consensual.

The constitutional question presented by the Menifee District is essentially the same as that presented in Haney v. Board of Education, supra, which case involved an "Act 1" school district formed in Sevier County in the western part of Arkansas in 1949. The case involved Sevier County School District No. 1, which had been formed under the terms of Act 1 when three all black school districts did not consolidate with other districts and thus automatically were placed in a "County District." That district was adjacent to and practically surrounded by Lockesburg School District No. 16, an all white district. Suit was filed in federal court by a Negro plaintiff in 1967 to compel a consolidation of the two districts.

The facts in *Haney* were essentially as follows: When Act 1 became effective, there were 14 school districts in Sevier County, including the Lockesburg District which was centered in the City of Lockesburg. Some of those districts were all white, and some were all black. Following the general pattern that has been mentioned, the districts were consolidated along racial lines. Five all white districts were annexed to larger white districts with two of them being annexed to the Lockesburg district. Two all black districts were annexed to all black districts in an adjoining county. That left four all white districts which kept their identity, and three black districts which were merged into the County District. It appears that some Negroes lived and owned property in Lockesburg, and that property was transferred by agreement to the all black County District.

That arrangement appears to have been satisfactory to all concerned, except the plaintiff who filed the suit. The District Court denied relief. Haney v. County Board of Education, W.D., Ark., 1968, 284 F.Supp. 916. That Court reasoned that the existing situation was not unconstitutional because Act 1 was not passed to promote or preserve racial segregation. The District Court also felt that it was powerless to order consolida-

tion because under Arkansas law two school districts cannot ordinarily be consolidated without the approval of a majority of the voters of both districts, and it was evident that the black voters in the County District would not vote in favor of consolidation.

The Court of Appeals reversed the decision of the District Court and ordered that the two districts be consolidated notwithstanding any impediments presented by Arkansas law. The Court of Appeals found that it was no coincidence that the County District was formed as an all black district, and that the reason that it was so formed was the desire to comply with the State's requirement that its public schools be racially segregated.

In the course of its opinion the Court of Appeals said (410 F. 2d at 924-925, citations omitted):

> "if segregation in public schools could be justifed simply because of pre-*Brown* geographic structuring of school districts, the equal protection clause would have little meaning. Such a position 'would allow a state to evade its constitutional responsibility by carve-outs of small units.' . . . More ingenious methods have been tried and have failed. . . .
>
> "State legislative district lines, congressional districts and other state political subdivisions have long ago lost their mastery over the more desired effect of protecting the equal rights of all citizens. . . .
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> * * * * * *
>
> "Political subdivisions of the state are mere lines of convenience for exercising divided governmental responsibilities. They cannot serve to deny federal rights. . . ."

The Court recognizes that the local districts involved in this case did not transfer territory to the Menifee District as the Lockesburg District transferred territory to the Sevier County District, but, as has been observed, some of the defendant districts in this case did transfer pupils from district to district in order to preserve segregation in the schools. Aside from that, however, the Court does not consider the "innocence" of the defendant districts to be of controlling importance.

As the Court reads it, *Haney* teaches that if a pre-*Brown* school district was formed, by consolidation or otherwise, on the basis of race and by reason of a State requirement that public schools be segregated, the continuation of such a district to the present day as a racially identifiable district is unconstitutional even though its continued existence is countenanced by State law. And that is exactly the situation that the Menifee District presents.

It is clear that neither the State of Arkansas itself nor any of its educational agencies in Conway County has any compelling legitimate interest in preserving Menifee as it is or in preserving the status quo as far as other districts are concerned. On the contrary, it appears to the Court that the existing geography of the districts works directly against an efficient system of public education in the County, and the present school organization would never have come into existence but for the presence of a substantial Negro minority in parts of the County and the pre-*Brown* segregation requirement, and that it remains in existence today simply because school officials in the County and presumably a majority of the people have not wanted to change it.

On this phase of the case the conclusion of the Court is that the Menifee District as presently constituted is unconstitutional, and that the unconstitutionality must be eliminated. This does not mean necessarily that the Menifee District must cease to ex-

ist, but it does mean that it cannot continue as a district devoted primarily, if not exclusively, to the education of Negro students.

As far as remedy is concerned, the Court agrees with the Government that such restructuring of Conway County school districts as may be necessary to eliminate the unconstitutional situation existing with respect to Menifee should be conducted insofar as possible in conformity with existing State law. It should be emphasized, however, that deficiencies or obstacles to be found in the Arkansas school laws must not stand in the way of the discharge of the constitutional duty of the State and its subdivisions.

The Government would have the Court direct the State Board of Education to come forward with a plan to solve the Menifee problem. The Court thinks that in deference to the legitimate policy of the State that favors local control of public school organization the plan should be formulated at the local level, but with the State Board being expected to afford to the local authorities such advice and assistance as they may request and as the State Board and the Director of Education may be in a position to provide.

As the Court sees it, the duty to eliminate racial discrimination in the Menifee District is the common duty of the County Board of Education and of the several individual districts in the County, and they should work together to devise a common plan. If they can do so, well and good. Otherwise, separate plans may be submitted. If the Government desires to suggest a plan, it may do so, as may any group of interested citizens of the County.

Turning now to the problem of the Center School and regarding that problem separate and apart from the larger problem presented by the Menifee situation, the Court finds that the County District is operating two schools, one of which is a clearly identifiable Negro school.

While it appears from the complaint that a few white students were assigned to the Center School during the 1971-72 school year, no white students attended that school during the 1972-73 school year, and there is no reason to believe that in the future any substantial number of white students will attend that school voluntarily or by virtue of assignment by the County Board of Education, assuming that the County District remains in existence.

It is clear that this dual school system must be eliminated by one means or another as of the beginning of the 1973-74 school year, regardless of what may be done with respect to overall restructuring of school districts in the County to solve the Menifee problem.

The record reflects that the 1972-73 enrollment of the County District was 154 students, a number probably in excess of the capacity of either the Jerusalem or the Center School standing alone. It would thus appear that there are two methods of eliminating the dual school system in the County District. The schools could be paired, with students in certain grades being assigned to one school without regard to race and with students in other grades being assigned to the other school without regard to race. The other method would be to close the Center School and assign the students of that school to Nemo Vista or Wonderview or both. If the County Board should decide on the latter course, the other schools affected will be expected to accept the Center School students without regard to any impediments imposed by State law.

Another approach, and perhaps the best one from the standpoint of efficiency and quality of education, would be for the County District simply to close both the Jerusalem School and the Center school and thus go out of business as an operating district. Should such a course be followed, the affected students could be assigned appropriately to other districts.

It goes without saying that any plan the County Board may adopt to solve the Center School problem must not be tainted with racial discrimination with regard to faculty members. As counsel will recall, the Morrilton District had trouble in that area when it integrated its own schools. Smith v. Board of Education, Morrilton School District No. 32, 8 Cir., 1966, 365 F. 2d 770.

There remains to be considered the question of timing. As already indicated, the County Board of Education will be required to eliminate the existing dual school system in the County District as of the commencement of the 1973-74 school year, and the Board is now directed to advise the Court not later than August 15, 1973, as to what it intends to do to accomplish that end.

The Government asks that a plan be devised for Menifee to go into effect as of the opening of school this year. The Court thinks that that request is unrealistic, and that more time will be required to formulate and implement a feasible plan for Menifee and the other districts that may be affected by that plan.

In the first place, the time between now and the opening of school in September is relatively short. Local school administrators who will need to participate in the formulation of a workable plan may not be readily available during what is left of the vacation season.

More basically, the solution of the Menifee problem may be a complex one. More is involved than counting heads and drawing lines on a map. There are a number of factors to be considered, including matters of finance, taxation, bonded indebtedness, and allocation of physical school properties. Proper consideration of those factors may require an additional hearing or additional hearings before the Court.

The Court is of the opinion that those concerned should be allowed until October 1 of this year to submit a plan or plans. When that is done, the Court will set a relatively short period of time for the filing of objections, and will hold such hearing on the objections as may be necessary.

A decree in accordance with the foregoing will be entered.

Dated this 26th day of July, 1973.

/s/ J. SMITH HENLEY
United States District Judge

APPENDIX E

In the United States District Court
Eastern District of Arkansas
Western Division

United States of America,
Plaintiff,
v.
State of Arkansas et al.,
Defendants.
LR-72-C-290

DECREE

(Filed July 26, 1973)

Pursuant to Memorandum Opinion this day filed herein it is by the Court CONSIDERED, ORDERED, ADJUDGED, and DECREED:

1. The term "State defendants," as herein used, means the members of the Arkansas State Board of Education and the Director of Education of the State of Arkansas, and their successors, agents, and employees.

The term "locak defendants," as herein used, means the County Board of Education of Conway County, Arkansas, the members of said Board, and the Board's chief executive officer, and their successors, agents, and employees; and the term "local defendants" also includes the six public school districts now operating in Conway County, Arkansas, and identified in the opinion of the Court, the members of the Boards of Directors of each of said Districts, the Superintendent of Schools of each of said Districts, and the successors, agents, and employees of all of said Districts, Directors, and Superintendents.

2. The Court now finds and adjudges:

(a) That East Side School District No. 5 of Conway County, Arkansas, referred to in the opinion as the "Menifee District," is a school district which is clearly identifiable as a district designed and used primarily, if not exclusively, for the education of Negro students, and that its continued existence is a result of racial segregation in public schools imposed originally by State law, and that the continued existence of said District as now constituted is violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

(b) That the Center School operated by Conway County School District No. 1 of Conway County, Arkansas, is an elementary school which is clearly identifiable as a school designed and operated exclusively or primarily for the education of Negro students, and that its continued operation as such a school is violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

(c) That the Conway County Board of Education, the Members of its Board of Directors, its Superintendent of Schools or Chief Executive Officer, and their successors, agents, and employees be, and they hereby are, permanently enjoined from continuing to operate the present dual system of racially identifiable elementary schools in Conway County School District No. 1; and that they be, and they hereby are, mandatorily enjoined and directed by whatever means may appear to be necessary and desirable, and notwithstanding obstacles or deficiencies to be found in existing Arkansas State law, to disestablish said unconstitutional dual school system effective as of the beginning of the 1973-74 school year, and to report to this Court not later than August 15, 1973, what they propose to do to effect said disestablishment.

(d) That the plan adopted by the County Board may require the transfers of students now attending the schools of the County District to other Districts within Conway County; and, if so,

the transferee District or Districts will be, and they hereby are, mandatorily enjoined to accept the transfers without regard to obstructing or deficient provisions of existing Arkansas public school laws relating to the transfers of students from district to district.

(e) That the local defendants, above defined, will be, and they hereby are, permanently enjoined and restrained from continuing to permit the continuation of the existing unconstitutionality of East Side School District No. 5 of Conway County, Arkansas; and that they will be, and hereby are, mandatorily enjoined to file with this Court not later than October 1, 1973, a plan or plans for the elimination of said unconstitutionality without regard to obstacles or deficiencies that may be found in existing Arkansas school laws relating to the formation, alteration, merger, or consolidation of public school districts.

(f) That in connection with the formulation of the plan or plans mentioned in the preceding paragraph hereof the State defendants, as above defined, will be, and they hereby are, mandatorily enjoined to afford to the local defendants upon request such advice and assistance as the State defendants may be in a position to afford.

3. The Court retains jurisdiction of this cause and of the parties hereto for all appropriate purposes including the holding of such further hearings and the entry of such further orders or decrees as may appear necessary or proper.

Dated this 26th day of July, 1973.

/s/ J. Smith Henley
United States District Judge

APPENDIX F

In the United States District Court
Eastern District of Arkansas
Western Division

United States of America,
Plaintiff,
v.
State of Arkansas et al.,
Defendants.
} LR-72-C-290

Supplemental Opinion and Decree

(Filed August 23, 1973)

Reference is made to the Memorandum Opinion and the Decree of this Court filed in subject case on July 26, 1973. Particular reference is made to Paragraph 2(b) (c) and (d) of the Decree which deal with Conway County School District No. 1 and its officials who are defendants in the case.

The Court found that the Center School operated by the County District is an elementary school which is clearly identifiable as a school designed and operated exclusively or primarily for the education of Negro students and that its continued operation as such a school is violative of the Equal Protective Clause of the Fourteenth Amendment to the Constitution of the United States, and the Court enjoined the County Board of Education, and its members, officials, agents, and employees from continuing to operate the present dual system of racially identifiable elementary schools in the County District, and the Court mandatorily ordered that the County District by whatever means might appear to be necessary and desirable, notwithstanding obstacles or deficiencies to be found in existing Arkansas State law, disestablish the unconstitutional dual school system effective as of the beginning of the 1973-74

school year, and report to this Court not later than August 15, 1973, what the District proposed to do to effect the mandated disestablishment.

The Court recognized that any plan adopted by the County Board might require the transfers of students currently attending the schools of the County Districts to other Districts within Conway County. And the Court's decree specifically provided that if the District's plan involved such transfers of students, the "transferee District or Districts will be, and they hereby are, mandatorily enjoined to accept the transfers without regard to obstructing or deficient provisions of existing Arkansas public school laws relating to the transfers of students from district to district."

The County District did not file any formal report with the Clerk of this Court or with the Court itself. However, under date of August 14, 1973, counsel for the District wrote a letter to the Court which will be made part of the record. In that letter counsel stated that the County Board felt that ultimately it should follow one of the suggestions appearing in the Court's opinion, namely, that both of the schools operated by the District be closed and the students assigned to other districts in Conway County. However, counsel stated that the Board desired to continue to operate through the 1973-74 session or at least until an overall plan designed to eliminate racial segregation in the East Side School District No. 5 could be worked out and approved.

Counsel's letter did not include any undertaking to eliminate the unconstitutional condition existing within the County district, and in fact a few days ago the County District opened its two schools on a defacto segregated basis which cannot be tolerated, and which must be eliminated not later than Tuesday, September 4, 1973.

When the Court wrote its original opinion, it thought that if the District chose to do so, it could eliminate segregation within

its borders by pairing grades in the Center School and in the Jerusalem School. The Court finds from its investigations and from conferences with counsel since receiving the letter above-mentioned that it is not realistic to pair the two schools since the degree of racial balance achieved would not justify the extensive transportation burden imposed.

The best solution to the problem would be to close both of the County District's schools and assign most or all of the students to Wonderview School District No. 2. The Court has determined, however, that at this time the Wonderview District simply does not have the capacity to receive the number of students that would be transferred to it should that solution be adopted.

After careful consideration the Court has come to the conclusion that the following steps, which will involve the County District, the Wonderview District, and Morrilton School District No. 32, must be taken:

1. As of September 4, 1973, the Center School must be closed.

2. Students presently enrolled in Grades 1, 2, 3, 5, and 8 at the Center School must be transferred to the Wonderview District.

3. Students presently enrolled in Grades 4, 6, and 7 at the Center School must be transferred to the Jerusalem School.

4. The administration of the Jerusalem School is to be taken over by the Wonderview District. As far as the current school year is concerned, officials of the Wonderview District must assign the teachers now employed by the County District to either the Wonderview school complex or to the Jerusalem School, and must deal with those teachers in a racially non-discriminatory manner.

5. The black students from the Hickory Hill community or area who are now attending the Jerusalem School or the high school operated by the Wonderview District must be transferred

to Morrilton School District No. 32, except that such black students who are in the 11th and 12th grades at Wonderview may complete their high school education there if they desire to do so; however, any such student who wished to be transferred to Morrilton is to be transferred.

6. The County District is to pay all of the expenses of transporting transferred students to and from school, and is also to pay the salaries of the teachers whom it has employed for the current year.

7. While the County District will cease to function as an operating district, it will retain its existence as a conduit of funds to the Wonderview District and to the Morrilton District. Generally speaking, the funds of the County District are to be so administered that the funds follow the students, and in any event Wonderview and Morrilton are to be reimbursed for expenses incurred by them in educating the students assigned to them.

There are two general observations that the Court desires to make at this point.

The Court's investigation leads it to conclude that the County District has more teachers than it needs; those teachers, of course, are to be retained by the Wonderview District for the remainder of the current school year. As to future years, it appears to the Court that all of the students who will attend the Jerusalem School this year after the steps above outlined have been taken will probably be assigned ultimately to the Wonderview District, and the additional space for them will have to be provided. It occurs to the Court that when those assignments are made, the Wonderview District may find itself overstaffed as far as teachers are concerned, and that it may be able to recoup in large measure, if not entirely, and over a comparatively short period of time the cost of providing additional space by a reduction in the teaching force. It goes without saying that if a reduction in force takes place, it must not be tainted with racial discrimination.

The Court is aware that the steps that it is ordering to be taken will not be approved by all of the patrons of all of the three Districts to be affected by the taking of those steps. That cannot be helped. The County District has operated a de facto segregated elementary school system for nineteen years since the *Brown* decisions of the Supreme Court of the United States; the continuation of such a system in the current school year simply cannot be tolerated. The elimination of segregation in the County District necessarily, in the existing circumstances, affects the Wonderview School District and the Morrilton School District, and, as indicated in the Court's original opinion, those Districts cannot avoid the impact by referring to Arkansas statutes dealing with local school district organization.

In view of what has been said the original Decree of this Court in this cause will be, and hereby is, supplemented as follows:

1. The Conway County Board of Education and the members thereof will be, and they hereby are, Ordered to close the Center Elementary School now operated by Conway County School District No. 1 not later than September 4, 1973, and as of that date to turn over to Wonderview School District No. 2 the administration of the Jerusalem Elementary School currently being operated and administered by the County District. The Wonderview District and its officials will be, and they hereby are, Ordered to accept the administration of the Jerusalem School. If the Wonderview District desires to make racially nondiscriminatory use of the physical facilities at the Center School, it may do so.

2. The Conway County Board of Education and the members thereof will be, and they hereby are, Ordered to transfer to the Wonderview District students now enrolled in Grades 1, 2, 3, 5, and 8 at the Center School, and the Wonderview District and its authorities will be, and they hereby are, Ordered to accept the transfers of those students. The Conway County Board of Education and its authorities will be, and they

hereby are, Ordered to transfer students now enrolled in Grades 4, 6, and 7 at the Center School to the Jerusalem School.

3. The Conway County Board of Education and its members will be, and they hereby are, Ordered to transfer to Morrilton School District No. 32 all Negro students residing in the Hickory Hill community or area who are now attending the Jerusalem School or Wonderview High School, provided that any of such Negro students who are in the 11th or 12th grades and who desire to complete their high school education at Wonderview High School may do so. The Board of Education of Morrilton School District No. 32, and the members thereof, will be, and they hereby are, Ordered to accept the transfers of the Negro students just mentioned.

4. The transfers above ordered are to be effective as of the opening of school on September 4, 1973, and are to be carried out without regard to obstacles or deficiencies to be found in the public school laws of the State of Arkansas.

5. The Wonderview District and its authorities will be, and they hereby are, Ordered to honor the contracts of all teachers currently employed by the County District, and to assign those teachers either to the Wonderview School or to the Jerusalem School. The Wonderview District and its authorities and employees will be, and they hereby are, enjoined and restrained from discriminating against any faculty member on the basis of race.

6. The County District will remain in existence as a political entity for the purpose of administering public funds coming into its hands, and to serve as a conduit of such funds to the Wonderview District and the Morrilton District. The County District and its authorities will be, and they hereby are, Ordered to pay the salaries of teachers currently employed by the District as called for by the present contracts of those teachers, and to pay the expenses of transporting all transferred students to and from the school. The County District and its authorities will be,

and they hereby are, further Ordered to administer insofar as possible funds coming into its hands and allocable to students transferred out of the District in such manner that the funds follow the students into the transferee districts, and to reimburse the Wonderview District and the Morrilton District for expenses incurred in educating transferred students.

The Court retains jurisdiction of this cause and of the parties hereto for all appropriate purposes.

Dated this 23rd day of August, 1973.

/s/ J. Smith Henley
United States District Judge

APPENDIX G

In the United States District Court
Eastern District of Arkansas
Western Division

United States of America,
Plaintiff,
v.
State of Arkansas, et al.,
Defendants.
} No. LR-72-C-290

U.S. District Courtroom,
U.S. Post Office & Courthouse,
Little Rock, Arkansas,
Friday, March 2, 1979.

* * * * * * * *

Excerpted Findings

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APPEARANCES:

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Little Rock, Arkansas.

PROCEEDINGS

THE COURT: In 1973 Judge Henley determined that the situation in Conway County with respect to the East Side District was unconstitutional. His opinion clearly implicates the State and each of the school districts in Conway County both in the creation of the situation and in the fostering and maintenance of that situation to the present day. He made it clear that all parties might be involved in working out the remedy.

Six years later we find that no agreement has been reached, and this intolerable situation with respect to the East Side District remains essentially unchanged. It is obvious that the Court has been too lenient in attempting to provide an adequate opportunity for the parties to effectuate an essentially locally-determined solution. The Court, therefore, intends to act promptly to bring the situation in Conway County into compliance with the Constitution.

After reviewing the plans and listening to the evidence which I find sufficiently reliable to make the essential decisions required here today, the Court is convinced that the basic concept of Government's Plan B should be approved and adopted by the Court.

We need a plan which will disestablish the East Side District and fully integrate all of the resulting districts and a plan which is likely to continue to work effectively in the future.

Government Plan B results in the most complete and in the most equitable integration of the students and the children of Conway County. It is the plan which the Court believes is most likely to prevent future resegregation. I also believe it to be the plan which is most consistent with educational objectives. I believe that it results in the possibility of the greatest and most efficient use of existing personnel and facilities. It has been designated as the second choice of most of the parties to the action.

The final plan will have to be fully implemented by the beginning of the August-September 1979 school year. Now although the Court is adopting the fundamental philosophies of Government Plan B, it will retain a certain amount of flexibility with respect to the details. In other words, the Court approves the three-district county structure and will require, therefore, as the first order of business, that definite boundary lines be established between the new district and the Wonderview and Nemo Vista districts.

Now let me ask first Mr. Mott and Mr. Warren. I am going to insist, of course, that the boundaries be drawn so that the racial composition of those two school districts will have not less than 22 percent blacks. That allows a little margin for error over what has been presented here. Let me ask you both: have the lines been drawn or are they still a speculative issue to accomplish the result that has been represented in essentially every plan that has been presented here today? Mr. Mott?

MR. MOTT: If the Court please, the lines of Wonderview as they exist presently do accomplish the Court's designated purpose. Our ratio now is approximately 24 percent.

THE COURT: I hear nobody saying that is not so, so I assume that as between the new district to be formed and Wonderview the line is established.

MR. MOTT: Right.

THE COURT: Now let me ask Mr. Warren.

MR. WARREN: I think, Your Honor—and I'm told by Mr. Adams—if the line is drawn as we suggested to take in the Holly Springs, that six sections down there, our ratio will be, I believe, 24 percent.

THE COURT: Well, what I want done as the first order of business, I want that line established and I want then the results to be able to be reported to the Court that it does result in the ratio of not less than 22 percent black.

Now that the basic structure has been determined, I am going to ask the parties connected with the Morrilton District, the Plumerville District, and the East Side District to meet again to work out all details concerning pupil assignment zones, the integration of existing faculties and administrative staffs, the utilization of existing facilities, the transportation of students, the structure of the new school board, the name possibly to be given to the new district, the best procedures for implementation of the Court's order.

In creating attendance zones, or if assignment policies are used other than zones, you must keep the percentage of blacks in each school and each grade at not less than 13 percent or greater than 33 percent. This requirement, I should point out to the people at Wonderview and Nemo Vista, is required in their districts also.

I am going to direct that the appropriate officials of the State Board of Education work with the parties in the preparation of this detailed plan, and I am hopeful that arrangements can be made so that Drs. Field and Buford can assist in the project and possibly other experts.

I am at this time going to appoint a committee consisting of the presidents of each of the three school boards involved in the formation of the new district, the three superintendents of each of those districts, the principals of the three high schools in those districts, and I am going to ask that they decide among themselves on a method of supplementing that committee by bringing in one teacher from each of the districts and one parent or representative of parents' organizations. So there will be three teachers and three parents, and that will be the committee.

The parties will advise the Court on the identity of the members of the committee within one week of this date—that is, by March 9th.

The officials of the State Department of Education and the other experts, if available, will work with the committee and provide them with data and professional assistance. The primary responsibility for submitting the plans to the Court, however, is with the committee. Their plan will be submitted within 40 days of this date.

Now every plan that has been submitted has its advantages and disadvantages. The Government plan carries with it the disadvantage—which I look upon as a disadvantage—of diminishing local control, local identity, local autonomy. I was

impressed with Mr. Chambers' testimony. He argued for a plan which would preserve that identity and preserve what he hoped to be a broader participation and control over local affairs by essentially local people, and I think that was the sentiment of many of the witnesses.

The Court is sympathetic with that idea and agrees generally with the quotation from the booklet "Economy, Efficiency and Equality" that there is no magic in consolidation, especially when you get into the larger districts. We are, however, dealing with essentially a small community, Conway County. That should be a community, 16, 18,000 people. I don't see that what is lost will not be greatly offset by what is gained, but I am going to be insistent that only what has to be lost is lost. In other words, I want this planning committee to take it as one of their objectives to preserve in their detailed plans as much local participation, availability of resources that it can. And I think perhaps, except at the high school level, that this can be accomplished.

In any event, it is going to be a concern of the Court that particularly East Side and the blacks do not bear the full burden of this desegregation problem. I am telling you that ahead of time, and I am hoping that this committee will take it as an article of faith that they need to consider and to plan carefully to see that the burdens and the benefits are spread equally among the citizens of the county.

Now, of course, the degree of which the remaining problems are solved by local people will depend upon the extent of their own efforts, their fairness, their objectivity, their goodwill, and the quality and content of their recommendations, and their consistency with what is required and has been stated here today.

Obviously there is going to be needed a predisposition to accomplish the goal. It is easy to destroy. It is easy to put

roadblocks in the way of what must be done. It takes people of stature to really go against their own best judgment perhaps but work in good faith to accomplish goals that are required by the Constitution and the law.

So I am hoping that now the parties are no longer speculating about the basic structure of what will be required that they can sit down and come up with something that is satisfactory to everybody in the three districts.

Now that is a big order. I may file a supplementary opinion giving more direction, but I am not inclined to because I want the State Department of Education and the experts to have maximum flexibililty in recommending to the committee suggestions about how we should proceed from here.

It may even be that part of their recommendation will be that the mechanics of implementation perhaps follow the structure of existing state law in the context of annexation or consolidation, the election of board members, the structuring of future authority and control. I want you to give a lot of thought to your faculty, your staff, and the superintendents and the people who have the jobs and how best to utilize their talents.

Although I have not adopted the details of the Government plan, there are obviously some suggestions they made a part of their plan that might be considered in further efforts to work this thing out. I greatly appreciate the Department of Education's contribution to this project. I hope they will continue to work in close harmony with local people to effectuate the orders of the Court.

I want them to look into these questions that they mentioned in their report at the end: the problem of the timing, the tax rates, the new board, the staffing, and so forth; matters which they pointed out appropriately would require some further study.

Dr. Field has indicated his lack of confidence in some of the data and so have some of the other parties. The generality of the Court's ruling is such that it doesn't build upon the complete accuracy of those reports but on the overall effect of them. It may be that better data will indicate better solutions when you are talking about transportation, school zones, and so forth.

Any other questions?

MR. LIGHT: Your Honor, I inquire only because I know the clients who have a lawyer here representing the school district will make this inquiry before we leave the courthouse. Does the Court intend to enter a final appealable order next week?

THE COURT: I think it might not be bad if—and if you can maybe help me and see whether I can help you. If your principal argument as to the remedy is the involvement of your district and other districts in the solution, the multi-county solution, then I think I can enter a final order which could be appealable and which would not interfere with the ongoing preparations for the August-September school term but yet might proceed into the Court of Appeals and be over with in time for us all to know whether we are right or wrong. Is that what you have in mind?

MR. LIGHT: That and the jurisdictional question itself.

THE COURT: In other words, I guess I could decree that there be in a sense the three-district plan as adopted and all further solutions will be made within that context. That more or less can be the decree from which you can appeal.

Do you think that would be adequate, that type of decree?

MR. LIGHT: I think so, Your Honor, if you are indicating that you retain jurisdiction to effectuate—

THE COURT: I can certify it as an order that I felt to be appealable and reserve and make it clear that we are going to proceed with the planning and implementation of the program.

MR. LIGHT: I think that will give every party the opportunity.

THE COURT: We will try to get that in early next week.

MR. WARREN: Your Honor, what time levy do we have on getting the mechanics of establishing the southern boundary of Nemo Vista?

THE COURT: It is such an important first decision I hope you might get it resolved by the end of next week. Before this committee has its first meeting—and I am going to have their identity by the end of next week—they should have it in hand to start to work because that will be the premise upon which their work will be based.

MR. WARREN: We will have it to you, a specific designation of the boundary.

THE COURT: I want to thank the attorneys and the parties. It is a difficult case and I know you have people back home that have very strong feelings, perfectly understandable, and the Court knows of no way to satisfy everybody; but it does know its duty—thinks it does.

MR. MERCER: Your Honor, may I inquire? Does the Court envision a necessity for school board elections to continue on the second Tuesday in March?

THE COURT: The election is the second Tuesday in March?

MR. MERCER: All school board elections across the state.

THE COURT: Which is what date?

MR. MERCER: The 13th.

THE COURT: I would assume they would go forward and should because essentially those boards will still have, through their presidents and otherwise, an input into all of this. They will be essentially being called upon by constituents to make in-

put, and should, into the committee's work and presentations. I am not going to enjoin the elections, I'll put it that way, so I assume it will go forward under state law.

Court is in recess.

(Whereupon, at 6:45 p.m., the above-entitled matter was concluded.)

CERTIFICATE

I, Carolyn S. Fant, Official Court Reporter for the United States District Court for the Eastern District of Arkansas, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true and correct transcript of proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/ CAROLYN S. FANT
Carolyn S. Fant, Official reporter

APPENDIX H

In the United States District Court
Eastern District of Arkansas
Western Division

United States of America
Plaintiff

v. No. LR-72-C-290

State of Arkansas, et al.,
Defendants

ORDER

(Filed March 6, 1979)

Pursuant to the findings of fact made in open court on March 2, 1979, it is Ordered that the remedy to be effected in this desegregation suit will essentially take the form of the Government Plan B. Wonderview School District will remain unchanged. Nemo Vista School District will be slightly enlarged, as outlined at the hearing, to bring in enough black students to make its overall percentage of black students not less than 22 percent. The present East Side, Plumerville, and Morrilton school districts will then be combined into one district. A detailed plan effecting this overall scheme will be submitted by April 1i, 1979, in accordance with the Court's instructions to the parties on March 2. Full implementation will be accomplished in ample time to make same effective at the beginning of the school year commencing in August, 1979.

To the extent that any motions seeking relief from Judge Henley's judgment in this case are still pending on behalf of defendant Morrilton School District, each of such motions is hereby denied.

Dated this 5th day of March, 1979.

GARNETT THOMAS EISELE
United States District Judge

Supreme Court, U.S.
FILED
DEC 28 1979
MICHAEL RODAK, JR., CLERK

No. 79-713

In the Supreme Court of the United States

OCTOBER TERM, 1979

MORRILTON SCHOOL DISTRICT NO. 32, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners, two school districts and their respective officials, seek review of a court of appeals decision requiring these districts to merge with a third district because, as both courts below concluded, "[t]he geographical arrangement of the * * * districts * * * results from the gerrymandering of district lines * * * in deference to the requirement of [racial] segregation" (Pet. App. A-11, A-30). The court of appeals, in an opinion upon which we rely, properly applied the principles established by this Court governing remedies for inter-district segregation, and there is no reason for further review.

1. This suit was filed by the United States in 1972 to eliminate continuing vestiges of the racially dual school system required by Arkansas law prior to 1954. Named as defendants in this action were the public school authorities of the State of Arkansas and of Conway County, Arkansas, and the six school districts of that county and their officials.

In 1973, the district court entered an opinion and decree (Pet. App. A-21 to A-49) holding that the East Side District, one of the six defendant districts, was created and maintained as an all-black school district pursuant to the previously extant state segregation law (*id.* at A-25 to A-30). The district court found that the creation of this segregated school district was accomplished by the racial gerrymandering of district lines over a period of years through consolidations in which small white school districts were joined together and small black school districts were combined with each other. As the district court concluded (*id.* at A-30):

> The geographical arrangement of the Conway County districts resembles a crazy quilt, and the resemblance results from the gerrymandering of district lines in years past in deference to the requirement of segregation; there can be no other explanation for it.

This finding was sustained by the court of appeals, which agreed that the "pattern of consolidations shows the impact of [prior *de jure* segregation]" (*id.* at A-11) and that "[t]he district lines in Conway County * * * reflect a discriminatory pattern" (*id.* at A-12).

In March, 1979, the district court held a hearing with respect to the remedy to be imposed for the unconstitutional condition previously found to exist (Pet.

App. A-50 to A-59).[1] Three of the defendant school districts—the two petitioner school districts and the East Side District—each advanced a desegregation plan. The United States advocated a fourth plan. The district court adopted the "basic concept" (*id.* at A-52) of the government's proposal and ordered the specified relief to be implemented by the beginning of the 1979-1980 school year (*id.* at A-60).

The court of appeals, sitting en banc, affirmed the district court order requiring consolidation (Pet. App. A-3 to A-4, A-5 to A-20), but modified the order to permit consolidation to occur in two steps (*id.* at A-19).

On June 28, 1979, Mr. Justice Blackmun denied petitioners' application for a stay of the court of appeals' judgment (No. A-1109), and the consolidation of the three districts at the high school level--the first step of the consolidation--was effective for the 1979-1980 school year.

2. As demonstrated by the findings and conclusions of the courts below, the boundaries of petitioner school districts were established in conformity with the requirements of *de jure* segregation.[2] In particular,

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[1] In 1973, the district court, to correct racial segregation in Conway County District No. 1, ordered the consolidation of the three non-continguous parts of that district with three white districts, one of which was petitioner Morrilton School District. No appeal was taken from that order and the consolidations were effective for the 1973-1974 school year.

[2] The courts below also found that petitioner districts operated dual school systems until the 1960's (Pet. App. A-15 n.5, A-27), that petitioner Plumerville District regularly sent its black students to the East Side high school (*id.* at A-15 n.5), and that there was continuing racial segregation in the composition of the faculties in petitioner districts (*id.* at A-12 to A-13).

petitioner districts border the East Side District, which was found to be unconstitutionally segregated. As shown by the map of the Conway County school districts (Pet. App. A-10), the East Side District is a conglomeration of non-contiguous land areas, with several of these areas separated from the main body of the East Side District by petitioner Morrilton District; petitioner Plumerville District's irregular east boundary adjoins the main part of the East Side District, and one of the East Side District's non-contiguous sections is to the west of the Plumerville District. The record fully supports the findings of the courts below that the boundaries of these districts were racially gerrymandered and that this *de jure* segregation affected petitioner districts as well as the East Side District (*id.* at A-16, A-30, A-35).

Given this determination of racial gerrymandering, the courts below correctly ordered inter-district relief "tailored to cure the ' "*condition* * * *." ' " *Milliken* v. *Bradley* (*Milliken II*), 433 U.S. 267, 282 (1977) (emphasis in original), quoting *Milliken* v. *Bradley* ("*Milliken I*"), 418 U.S. 717, 738 (1974). Gerrymandering is a common device of segregation, and the courts have consistently indicated that such a constitutional violation warrants inter-district relief. As the Court stated in *Milliken I*, *supra*, 418 U.S. at 744-745 (emphasis added):

> Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, *or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation.*

See also, *e.g.*, *Milliken I*, *supra*, 418 U.S. at 744 (citing *Haney* v. *County Board of Education of Sevier County*, 429 F. 2d 364 (8th Cir. 1970), "State contributed to separation of races by drawing of school district lines"); 418 U.S. at 755 (Stewart, J., concurring) (citing *Sevier County*, *supra*, "Were it to be shown, for example, that state officials had contributed to the separation of the races by drawing or redrawing school district lines * * * then a decree calling * * * for restructuring of district lines might well be appropriate"); *United States* v. *Board of School Commissioners of Indianapolis, Indiana*, 573 F. 2d 400, 403, 405, 407 (7th Cir.), cert. denied, 439 U.S. 824 (1978) (racial gerrymandering of school districts justifies inter-district relief under *Milliken I*).

Moreover, the court of appeals found in this case that "absent racial considerations, several areas would have consolidated with [petitioner] Morrilton, Nemo Vista or [petitioner] Plumerville instead of East Side" (Pet. App. A-12) and that "East Side is almost entirely black and includes territory that would properly have been absorbed by the surrounding districts were it not for racial considerations" (*id.* at A-14). We also note that, as petitioners acknowledge (Pet. 12-13), all remedial plans proposed to the district court, including those proposed by petitioners, called for some form of inter-district

relief. Especially in these circumstances, the courts below correctly determined that petitioners were "involved in []or affected by the constitutional violation" (*Milliken II*, *supra*, 433 U.S. at 282).[3]

3. Petitioners also challenge (Pet. 12-15) particular aspects of the relief ordered by the courts below. However, they fail to demonstrate how the remedy devised by the district court fell short of the requirements of *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), or *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 420 (1977). The "nature of the violation" here (*Milliken I*, *supra*, 418 U.S. at 738, quoting *Swann*, *supra*, 402 U.S. at 16) was state imposed racial segregation that governed school consolidations in Conway County prior to 1954; no consolidations occurred after 1954 until those ordered by the federal courts. It cannot be doubted that an appropriate corrective measure was to direct that school boundaries be redrawn to eliminate their racial characteristics. Furthermore, petitioners did not dispute

[3]Contrary to petitioners' contention (Pet. 6-7, 9-12), the decision of the court of appeals does not conflict with the decisions of this Court or of the other courts of appeals. Unlike the instant case, the boundaries of the Michigan school districts in *Milliken I* were not established "for the purpose of creating, maintining or perpetuating segregation of races" (418 U.S. at 748). Likewise, neither *Tasby* v. *Estes*, 572 F. 2d 1010 (5th Cir. 1978), cert. granted *sub nom. Estes* v. *Metropolitan Branches of Dallas NAACP*, Nos. 78-253, 78-282, 78-283 (Feb. 21, 1979), nor *Bradley* v. *School Board of the City of Richmond*, 462 F. 2d 1058 (4th Cir. 1972), aff'd by an equally divided Court, 412 U.S. 92 (1973), involved school district boundaries that had been racially gerrymandered. Moreover, the district court in *Estes* expressly observed that "interdistrict remedies have been ordered where school district boundaries were altered with significant segregative effect * * *" (412 F. Supp. 1185, 1191 (N.D. Tex. 1975)), but found that no such violation was present in that case (*id.* at 1192).

in the lower courts that, if there was to be any remedy at all, considerable alteration of their district lines as well as those of the East Side District would be necessary (Pet. 12-13; Pet. App. A-16 n.6). In fact, the plan adopted by the district court was favored over the other submissions by two of the affected districts (Pet. App. A-17) and was the second choice of most of the parties to the litigation (*id.* at A-52).

Nor did the district court, in adopting a remedial plan, override "manifest educational advantages" as petitioners assert (Pet. 14). The district court was fully mindful of the importance of local control and the need for quality public education (Pet. App. A-54 to A-55); it found that the plan it selected "results in the most complete and * * * equitable integration," is the "most likely to prevent * * * resegregation," is the "most consistent with educational objectives," and allows "the greatest and most efficient use of existing personnel and facilities" (*id.* at A-52). These findings were affirmed by the court of appeals (*id.* at A-17).

. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1979

DOJ-1979-12